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Supreme Court of the United States

OCTOBER TERM, 1928.

No. 590

BETHLEHEM STEEL COMPANY,
Petitioner,

against

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LIMITED,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, AND CONSENT THERETO BY RESPONDENT

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Supreme Court of the United States

OCTOBER TERM, 1938

No.

BETHLEHEM STEEL COMPANY,
Petitioner,

against

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LIMITED,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Bethlehem Steel Company respectfully prays that a writ of certiorari issue to review a judgment of the Supreme Court of the State of New York, County of New York, entered in the above-entitled case on January 13, 1939, upon the remittitur of the Court of Appeals of the State of New York reversing a judgment of the Appellate Division of the Supreme Court of the State of New York, which affirmed a judgment at Special Term of said Supreme Court of the State of New York.

The opinion of the Court of Appeals, and the dissenting opinion of Judge Finch (in which Judge Hubbs concurred), were rendered January 11, 1939, and are unreported (R. 106). The Appellate Division wrote no opinion; but the dissenting opinion in the Appellate Division is reported in R. 101. The opinion of Mr. Justice Rosenman at Special Term is reported in 164 Misc. 498, 299 N. Y. Supp. 862, and at R. 84-92.

SUMMARY STATEMENT

This case involves the question presented in No. 384 in this Court, *Guaranty Trust Company of New York* v. *Berryman Henwood, viz.:*

> Does Public Resolution No. 10 of the 73rd Congress (48 Stat. at L. 112) apply to coupons detached from corporate bonds expressed to be alternatively payable in a fixed number of dollars in gold coin of the United States of America at New York and a fixed number of units of a foreign currency at a foreign city, so that a respondent who has demanded payment in the foreign currency is limited in recovery to the number of dollars denominated in the bond, notwithstanding the fact that the value in dollars of the number of units of the foreign currency denominated in the bond exceeds that number of dollars?

In the present case, Mr. Justice Rosenman answered the question in the affirmative at Special Term (R. 84-92). The Appellate Division of the First Department affirmed, with two Justices dissenting (R. 101). The Court of Appeals reversed, with two Judges dissenting (R. 106).

STATEMENT

The bonds of Lackawanna Steel Company, from which the coupons involved in this case were detached, and the obligations of which were assumed by the petitioner, carried coupons in the following form (with appropriate insertions in the blank spaces) (R. 19):

$25.

On the first day of , 19 , unless the bond hereinafter mentioned shall have been duly called for previous redemption, LACKAWANNA STEEL COMPANY will pay to the bearer at its office or agency in the City of New York, U. S. A., TWENTY-FIVE DOLLARS, United States Gold, or in London, England, £5.2.10½ Sterling, or in Frankfort o/M. Germany, M 105, or in Amsterdam, Holland, Gl. 62, or if paid in France, Belgium or Switzerland, Fcs. 129.50, being six months' interest then due on its First Consolidated Mortgage Gold Bond, Series A, No.	$25 U. S. Gold £5.2.10½ Stg. Marks 105, Guilders, 62 Francs 129.50

J. F. HIGGINSON, Treasurer.

[REVERSE SIDE]

Payable in New York, at the Company's office, London, at Speyer Brothers, Frankfort o/M, at Lazard Speyer-Ellissen, Amsterdam, at Teixeira De Mattos Brothers, Brussels, at Societe Generale De Belgique, Basel & Zurich, at Schweizerische Kreditanstalt.

After June 5, 1933, the date of the approval of Public Resolution No. 10, the respondent, a Swiss corporation, presented coupons (which by their terms were payable

after June 5, 1933) for payment in Switzerland and demanded payment in Swiss francs. The petitioner refused to meet the demand; whereupon the respondent brought action in the Supreme Court of the State of New York to recover the dollar value of the Swiss francs which it claimed should have been paid when these coupons were presented for payment, and moved for a summary judgment.

Mr. Justice Rosenman wrote an extensive opinion setting forth the reasons on which he denied such summary judgment (R. 84-92); and his conclusion was affirmed by the Appellate Division (R. 101) (per Justices O'Malley, Townley and Cohn, with Justices Untermyer and Callahan dissenting); but was reversed by the Court of Appeals (R. 106) (Judges Finch and Hubbs dissenting). Summary judgment has accordingly been entered against the petitioner.

Reasons Relied on for the Allowance of the Writ

I

A STATE COURT HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE NOT HERETOFORE DETERMINED BY THIS COURT.

The question of application of Public Resolution No. 10 to corporate bonds of precisely this character has been in litigation in numerous courts, and has given rise to a remarkable diversity of opinion, but has not yet been the subject of any action in this Court other than the denial of a petition for writ of certiorari in *Henwood* v. *Anglo-*

Continentale Treuhand A. G., 298 U. S. 655, and the grant of a petition for a writ of certiorari in *Guaranty Trust Company of New York* v. *Henwood*, Oct. T. 1938 No. 384. Before its decision by the Court of Appeals of the State of New York, the precise question had been before three United States Circuit Courts of Appeals. The 9th Circuit Court of Appeals avoided a determination of the main question by reversing the decision of Judge Lindley, 10 Fed. Supp. 953, (which had been favorable to the respondent's view here), upon a procedural ground, *Southern Pacific Co.* v. *McAdoo*, 82 F. (2d) 121. The 2nd Circuit Court of Appeals decided in favor of the respondent's position in *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Railway Company*, 81 F. (2d) 11; and the 8th Circuit Court of Appeals expressly disagreed with it, *Guaranty Trust Company of New York* v. *Henwood*, 98 F. (2d) 160.

The question had been before the Appellate Division of the First Department of the State of New York four times. That Court in each case sustained the petitioner's position,—one Justice (of a court of four) dissenting in the first case, and two Justices (of a court of five) dissenting in the last two cases. *City Bank Farmers Trust Co.* v. *Bethlehem Steel Co.*, 244 App. Div. 634; *Anglo-Continentale Treuhand, A. G.* v. *Southern Pacific Co.*, 251 App. Div. 803; *Zurich General Accident & Liability Insurance Company, Limited* v. *Lackawanna Steel Co.* (this case), 254 App. Div. 839; and *Anglo-Continentale Treuhand, A. G.* v. *Bethlehem Steel Co.*, 254 App. Div. 844. The Court of Appeals has now reversed the Appellate Division, with two Judges (of a court of seven) dissenting.

We submit that it is rare for a case to reach this Court in which there has been a greater diversity of judicial opinion. The question appears to merit not merely actual decision by this Court (which might in any event be obtained in No. 384), but an opportunity to the parties in the New York State Court litigation to be heard in the presentation of the case to this Court. In other words, whether or not another case which may involve the same question be already here, it would seem that the discretion of this Court should be moved to permit argument before it by the parties which have litigated an important federal question before two state appellate courts that have expressly disagreed, and in each court with two dissenting judges.

In addition, petitioner's counsel (by leave of Court) filed a brief and took part in the oral argument before the 8th Circuit Court of Appeals. See 98 F. (2d) 160, 161.

Finally, it is possible that the decision in No. 384 may go off on a ground different from that on which a decision in this case would be based. See the brief of the respondent in that case in opposition to the petition for writ of certiorari therein. In that event, it would be necessary to grant a review of the cases in the State court, if the federal question is to be decided.

II

A STATE COURT HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE IN A WAY PROBABLY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

The adverse opinion of the Court of Appeals of the State of New York is based on an expressed agreement

with the opinion of the 2nd Circuit Court of Appeals in *Anglo-Continentale Treuhand, A. G.*, v. *St. Louis Southwestern Railway Co.*, 81 F. (2d) 11. The same is true of the dissenting opinion in the intermediate appellate court in New York State (R. 101). Neither opinion gave adequate, or indeed any, consideration to the *language* of the opinions of this Court in *Norman* v. *Baltimore & Ohio R. R. Co.*, 294 U. S. 240, and related cases, and in *Holyoke Water Power Company* v. *American Writing Paper Company*, 300 U. S. 324. The decisions in those cases (we submit) determined that cases of the character of this case,—*viz.*, cases involving particular applications of Public Resolution No. 10,—should be determined with a view to effectuating the intent of the Congress as therein set forth.

Indeed, neither in the opinion of the 2nd Circuit Court of Appeals, nor in the opinions of the judges of the courts of the State of New York which have accepted it, do we find any real consideration either of the language of Public Resolution No. 10 or of its spirit.

But in the able and comprehensive opinion of Mr. Justice Rosenman at Special Term in the present case, 164 Misc. 498, 299 N. Y. Supp. 862, R. 84-92, we find a convincing discussion of the language of Public Resolution No. 10, upholding its plain applicability to the state of facts presented in this case. And in the equally able and comprehensive opinion of Judge Stone for the 8th Circuit Court of Appeals in *Guaranty Trust Company* v. *Henwood*, 98 F. (2d) 160, we find a full discussion of the spirit of the Resolution as expressive of the intent of Congress, as interpreted in the light of the opinions of this Court above referred to: *Norman* v. *Baltimore & Ohio R. R. Co.*, 294 U. S. 240, and *Holyoke Water Power Company* v. *American Writing Paper Co.*, 300 U. S. 324.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of the State of New York, New York County, commanding said court to certify and send to this Court, on a day to be designated, a transcript of the record and of all proceedings in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the court below be reversed; and that the petitioner be granted such other and further relief as may be just and proper.

Dated, New York, N. Y., January 13, 1939.

FREDERICK H. WOOD,
WM. D. WHITNEY,
Counsel for Petitioner,
15 Broad Street,
New York, N. Y.

Supreme Court of the United States

OCTOBER TERM, 1938

No.

BETHLEHEM STEEL COMPANY,
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against
ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LIMITED,
Respondent.

CONSENT

Now comes Zurich General Accident & Liability Insurance Company, Limited, and consents to the grant of the petition for Writ of Certiorari herein, but without accepting or adhering to any of the arguments set out in the body of the foregoing petition.

NATHAN L. MILLER,
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15 Broad Street,
New York, N. Y.

APPENDIX

Public Resolution No. 10

73rd Congress

48 Stat. at L. 112

JOINT RESOLUTION

To assure uniform value to the coins and currencies of the United States.

Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) every provision contained in or made with respect to any obligation which purports to give the obligee

a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this resolution, the term "obligation" means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term "coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

SEC. 2. The last sentence of paragraph (1) of subsection (b) of section 43 of the Act entitled "An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes", approved May 12, 1933, is amended to read as follows:

"All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight."

Approved, June 5, 1933, 4.40 p.m.